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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 IN RE: PHENYLPROPANOLAMINE (PPA)
10 PRODUCTS LIABILITY LITIGATION

11 This document relates to all cases
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MDL NO. 1407

ORDER REGARDING
NONSETTLING DEFENDANTS'
OBJECTION TO CHATTEM
DEXATRIM® SETTLEMENT

15 This matter comes before the court on the objection of the nonsettling defendants to the bar
16 order on which the Chattem Dexatrim® Settlement is premised. The language to which nonsettling
17 defendants object is contained in the following sections of the Settlement Agreement:

18 Consistent with the provisions of Article 8 of this Settlement Agreement,
19 the releases herein shall extinguish any claims for contribution and/or
indemnification against Chattem or the other Released Parties.

20 Section 6.2 of the Settlement Agreement.

21 The parties hereby agree to request that the Court enter an order finding
22 this Settlement Agreement to be a good faith settlement and barring and
23 enjoining, to the extent permitted by applicable law, the commencement
24 and prosecution of any contribution and/or indemnification claim or action
25 by or on behalf of any . . . entity against Chattem or any other Released
26 Party for reimbursement for payments made or to be made to or on behalf
of any . . . Class Member for Dexatrim® Products Related claims, actions
or injuries[.]

1 Section 6.3 of the Settlement Agreement.

2 The nonsettling defendants fear that these provisions could have the effect of cutting off a co-
3 defendant's contribution rights where (1) Chattem is determined to have paid less than its proportional
4 share, and (2) the relevant jurisdiction employs a *pro tanto* rule. The court has reviewed the briefing
5 on this objection, and heard oral argument on the issue at the August 26, 2004 fairness hearing. At the
6 fairness hearing, the court ordered the nonsettling defendants to meet with Chattem and Class Counsel
7 and to draft language agreeable to all. The nonsettling defendants, Chattem and Class Counsel since
8 have informed that court that they were unable to settle on any such language, and have filed separate
9 proposals with the court.

10 Around the time of the fairness hearing, Chattem and Class Counsel submitted a proposed
11 Final Order and Judgment that incorporated language from the Settlement Agreement:

12 11. The nonsettling defendants in MDL 1407 and all other persons
13 or entities are permanently Barred and Enjoined from initiating,
14 asserting or prosecuting any claims or actions, including claims for
15 contribution, non-contractual indemnity, or subrogation, against
16 Chattem and any other Released Party for reimbursement of payments
17 made to or on behalf of any Class Member for any Settled Claims.
18 This Final Order and Judgment shall not be construed to bar claims
19 by non-settling defendants based on a contract between a nonsettling
20 defendant and a Released Party. Furthermore, the approval for this
21 Settlement and this bar order shall not be construed as precluding a
22 nonsettling defendant from enforcing any judgment reduction, credit
23 or setoff right otherwise available to them under applicable state law.

24 The nonsettling defendants insist on including language explicitly stating that the bar order
25 does not circumvent the application of state law allowing contribution. In addition, the nonsettling
26 defendants would like to include a meet and confer provision. The nonsettling defendants propose to
add the following language to the Final Order and Judgment:

The Court recognizes that despite the above bar, the Settlement cannot bar the application of a state law that may allow contribution, indemnity, and/or subrogation claims ("contribution rights"), the settling parties cannot successfully agree to circumvent those

1 contribution rights, and the Court cannot sanction circumvention
2 of those rights. The Court also recognizes that neither the Settlement
3 nor this Final Order and Judgment can adversely affect state-granted
4 setoff, credit, and/or judgment reduction rights ("setoff rights"),
5 and it is recognized and understood that nonsettling defendants are
6 entitled to such setoff rights regardless of the lack of a judicial
7 determination that Chattem and/or the Released Parties are joint
8 tortfeasors. Therefore, subject to the terms below, the Court does
9 not intend to bar or interfere with the exercise of contribution or
10 setoff rights that are appropriate and allowed by state law.

11 If a nonsettling defendant intends to assert contribution rights that are
12 appropriate and allowed under state law (including, but not limited to,
13 a situation where a nonsettling defendant needs to assert contribution
14 rights to preserve its setoff rights), the nonsettling defendant shall first
15 meet and confer with counsel for Chattem, any other affected Released
16 Party, and plaintiff in the pertinent case, and explain the need for
17 asserting its contribution rights. If, as a result of the meet and confer,
18 the parties agree that the assertion of such rights is appropriate, the
19 nonsettling defendant may assert such rights. If the parties do not agree
20 that the assertion of such rights is appropriate, the nonsettling defendant
21 may then file a motion asking for relief from this bar order, and the Court
22 shall retain jurisdiction over such motions. Upon hearing such a motion,
23 the Court will fashion an order that gives effect to the applicable state
24 law, nonsettling defendants' rights under that law, and this Final Order
25 and Judgment.

26 In turn, Chattem and Class Counsel express concern that the nonsettling defendants are
attempting to "provide for the unfettered right to maintain claims for indemnification and contribution
against Chattem and the other Released Parties[,]” a goal that is incompatible with the finality sought
by the parties to the Settlement. Chattem and Class Counsel note that only three of the 387 claims in
the Settlement involve a co-ingestion case in a *pro tanto* jurisdiction. Therefore, they reason that the
likelihood of a nonsettling defendant being prejudiced by the bar order in a such a jurisdiction is
extremely low. Chattem and Class Counsel, therefore, urge the court to use the language originally
presented in the proposed Final Order and Judgment. However, Chattem and Class Counsel “in the
spirit of compromise” also propose additional language giving the nonsettling defendants the right to
apply to this court for relief:

1 Despite the bar set forth herein, this Court retains jurisdiction to enforce
2 and interpret the terms of this Final Order and Judgment. If in a particular
3 case, no judgment reduction, set off or other credit is available to the
4 nonsettling defendant under applicable state law and the settlement
5 extinguishes otherwise applicable state law rights of indemnity and/or
6 contribution, the non-settling defendant may file a motion with the Court,
7 and if found warranted, the Court may fashion an appropriate remedy that
8 is consistent with the settlement agreement and the finality sought by that
9 agreement and by this Final Order and Judgment.

10 The court is of the opinion that the additional language proposed by Chattem and Class
11 Counsel adequately protects the rights of the nonsettling defendants, particularly where the likelihood
12 of the nonsettling defendants being prejudiced is so low. The court, therefore, approves Chattem and
13 Class Counsel's proposed alternative language. The court's Final Order and Judgment is
14 forthcoming, and will reflect this ruling.

15 DATED at Seattle, Washington, this 26th day of October, 2004.

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s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
United States District Judge